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No. 568

In the Supreme Court of the United States

OCTOBER TERM, 1965

ANGELO LOCASTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is reported at 319 F. 2d 916.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1963. A petition for rehearing was denied on August 19, 1963. By order of Mr. Justice Harlan, the time for filing the petition for certiorari was extended to and including October 18, 1963, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner adopts, insofar as applicable, the questions presented in the companion petitions for cer-

tiorari. In addition, the following questions are raised:

1. Whether the evidence was sufficient to sustain petitioner's conviction of conspiracy to import narcotics in violation of 21 U.S.C. 174.

2. Whether the trial court properly ruled as to the appointment and withdrawal of counsel.

STATEMENT

An indictment returned in the United States District Court for the Southern District of New York charged twenty-nine persons, including petitioner, with illegal importation of narcotic drugs and conspiracy, in violation of 21 U.S.C. 173, 174 (R. 9159–9176).[1] Following an abortive trial, several defendants were severed on motion of the government (R.R, JJ). The case then went to trial against petitioner and 13 codefendants. At the conclusion of all the evidence, the trial court acquitted one codefendant, and the jury found the remaining defendants guilty as charged. Petitioner was sentenced to imprisonment for twenty years and the court of appeals affirmed the conviction.[2]

An overall summary of the evidence presented at the trial and a description of the unprecedented series of outbursts which punctuated the proceedings, are set forth in our brief in opposition in *Ormento* v.

[1] "R" refers to the record in the court of appeals, "Tr. 1st trial" to the transcript on the first trial.

[2] The court also reversed and remanded the conspiracy conviction of another defendant, reversed outright the conspiracy conviction of three others, and reversed and remanded the convictions of the latter three on substantive charges. *United States* v. *Bentvena*, 319 F. 2d 916.

United States, No. 344, this Term. Here we recite merely the additional facts which bear upon the questions presented in this petition.

1. Edward Lawton Smith, the government's principal witness, described numerous trips along a route in New York City, where he and defendant Mancino made deliveries of narcotics (see Br. in Opp., No. 344, pp. 8–9). In the middle of March 1958, after returning to Frank's Bar (a meeting place) from such a trip, Mancino announced that he had to make a "run" on the hill to Rocco. He left, returning about thirty minutes later (Tr. 1472). In the middle of April 1958, Mancino received a box from Vecchio, took it to his apartment, and extracted from it white powder, which he distributed into various cellophane packages marked "the Viv, the Squeez-Inn, the 1717, and the hotel and Rock" (Tr. 1504–1505). In the latter part of April, after deliveries had been made along the route, Mancino dropped Smith off at Frank's Bar, saying "I will make the run on the Hill and I will be right back." A short while afterward he returned (Tr. 1553–1556).

About two days later, Mancino took Smith to a bar and there introduced him to "Rocco, up on the Hill" and "his partner, Puggy". The first was severed defendant Rocco Sancinella; the second was the petitioner, although it was not until later that Smith learned the name Loicano (Tr. 1556–1558).[3] Sanci-

[3] Petitioner stresses confusion by Smith as to the correct names of some of the conspirators, which became known to him only after his employment by the narcotics bureau. There was, however, no equivocation in Smith's identification of this

nella asked Smith if he would make some runs from Canada for him and petitioner, his partner. Smith replied that he was doing all right and was not interested. Petitioner thereupon urged, "Look, I don't know if you really understand the full amount of what he is saying to you, but I can guarantee you can make $100,000 to $140,000 a year. I will guarantee you over $100,000 a year." Smith still refused, but finally agreed to think about it (Tr. 1559–1560).

On another occasion in the middle of May, after they had made various deliveries on their route, Mancino said, "I want to take you with me up on the hill this time." (Tr. 1565–1568). Smith drove Mancino to the top of the hill and parked. Despite Mancino's urging, however, he refused to accompany Mancino inside and talk with Rocco and Puggy, declaring that he knew what they wanted to talk about and was not interested. Mancino went in without him and reported on his return that they were angry because Smith would not talk to them (Tr. 1568–1569).

2. Petitioner retained as his attorney Mr. Sylvester Cosentino, who had represented him in the first trial and whose alleged cardiac condition had been the basis for a number of motions for adjournment at that trial. Mr. Cosentino had experienced no further difficulties with his heart between the completion of the first trial and the day before this trial began (Tr. 1719–1720). When, on that day, Mr. Cosentino was reported to be in the hospital, the court appointed

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petitioner as the person who was introduced to him as Sancinella's partner (Tr. 1558). The "Angelo" referred to only by his first name in the testimony was Angelo Sannesso.

Mr. George Todaro, who had participated in the first trial, to represent Loicano until his retained counsel was able to return, and also to represent the Panico brothers, whose attorney was trying a case in a State court. All three defendants protested the appointment of Mr. Todaro as their counsel (Pre-trial Tr. 616–619) and refused to cooperate with him (Tr. 70, 123). Petitioner unsuccessfully sought a writ of mandamus from the court of appeals challenging the appointment. *Loicano* v. *McMahon*, 2d Cir., Docket No. 27487, April 4, 1962.

The trial court directed the government to refrain from introducing evidence dealing with the three defendants until the return of their retained counsel (Tr. 1394, 1544). On April 2, the second day of the trial, the cardiologist appointed to examine Mr. Cosentino reported that his clinical tests were negative. Another cardiologist was asked to make an independent examination (Tr. 232–233). On April 13, the court noted that that examination revealed no objective symptoms of any heart condition (Tr. 769, 1548).

Mr. Cosentino returned to the trial on April 16, at which time the court gave him access to the record of the trial thus far and offered him the opportunity to recall any witnesses for further cross-examination, to make any motions he desired, and to make an opening statement at the conclusion of the government's testimony. Mr. Cosentino moved, unsuccessfully, for a mistrial or severance on the ground of his absence from the trial (Tr. 1716–1721, 1726). In view of Mr. Cosentino's previous cardiac experiences, the court

instructed him to make arrangements for his replacement in the event that he was again unable to be present. Mr. Cosentino reported that Loicano would not discuss the matter with him, claiming that because of his earlier absence he had no right to be in the case (Tr. 1734, 1745). The court thereupon refused to release Mr. Todaro, who protested being kept in the trial. After continued efforts by the court, agreement was reached for temporary coverage in the event of Mr. Cosentino's inability to appear, and Mr. Todaro was released on May 5 (Tr. 3516–3520, 3574–3583).

ARGUMENT

1. Petitioner's challenge to the sufficiency of the evidence is without foundation. The witness Smith testified that petitioner was introduced to him by Mancino as the partner of defendant Rocco (of "Rocco's on the Hill") Sancinella; that Sancinella, in petitioner's presence and without contradiction by him, referred to ~~Loicano~~ petitioner as his partner; and that petitioner joined Sancinella in urging Smith to deliver narcotics for them directly from Canada. On the basis of that testimony, even without more, the jury was entitled to conclude, not only that petitioner was Rocco's partner, but that both were parties to the overall conspiracy charged in the indictment. It matters not whether the unsuccessful attempt to solicit Smith's services had in view merely a modification of the existing importation scheme, as the court below declared, or an altogether new and competing venture. In either case, the jury could reasonably infer that unless Loicano was part of the

existing conspiracy and therefore aware of Smith's role as courier in it, he would not have sought to enlist Smith as a deliveryman in a new importation operation. If additional proof were needed, it was supplied by Smith's further testimony that Mancino marked one of the cellophane packages (obviously containing heroin) for "the Rock"; that Mancino had announced, on two occasions, that he was on his way to make a "run" to "Rocco's on the Hill",[4] and that in one instance Smith had accompanied Mancino to the top of the hill while he made what appeared, in the circumstances, to be a delivery. Since petitioner was Rocco Sancinella's partner, the foregoing evidence viewed as a whole, amply supports the conclusion that petitioner, like others along Smith's route, was a recipient of the narcotics, illegal importation of which was the object of the charged conspiracy.

2. Equally groundless is petitioner's contention that he was denied a right to counsel of his own choice.[5] As the court below correctly pointed out (319 F. 2d 916, 936):

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[4] Petitioner does not, and could not, contend that these declarations of Mancino were inadmissible under the hearsay rule. They were admissible, in the first place, as utterances contemporaneous with non-verbal acts, independently admissible, which pertain to these acts and served to explain them. See *Beaver* v. *Taylor*, 1 Wall. 637, 642; *United States* v. *Annunziato*, 293 F. 2d 373 (C.A. 2); McCormick on Evidence (1954), 586–587. Moreover, there was evidence of the conspiracy to lay a foundation for their admission under the co-conspiracy to the hearsay rule.

[5] The defendant Sancinella had obtained a mistrial and severance in the first trial by his refusal to accept appointed counsel after his chosen counsel was reported ill during the trial (*United States* v. *Bentvena*, 288 F. 2d 442, 445–446).

> * * * The delay that would have been caused by acceding to * * * Loicano's insistence on Mr. Cosentino's services despite the knowledge of his heart condition and the fact that this condition had caused repeated motions for adjournments in the first trial is precisely the kind of obstruction which the right to counsel of one's own choice must not be allowed to produce. * * * One with a bent for statistics would find, no doubt, that if this trial were continued on every occasion that one or more of the defendants or their counsel so requested the trial would still be in progress. This disruption of the court's business and tampering with the rights of the other defendants and the government cannot be tolerated.

In the circumstances, it was entirely reasonable for the court to appoint Mr. Todaro, an experienced attorney already familiar with the case, to represent petitioner until Mr. Cosentino's return or until another attorney was retained. In the interim, the protective measures taken by the court were adequate to safeguard petitioner's right. During the period of Mr. Todaro's representation, the government, in compliance with the court's instructions, confined itself to presenting evidence relating to the substantive counts, in none of which petitioner was named. And when Mr. Cosentino returned, he was given ample opportunity to review the record and, if he so desired, to make appropriate motions, to make an opening statement at the conclusion of the government's testimony, and to recall any witnesses for further cross-examination.

There is no reasonable basis for the claim that petitioner was prejudiced in being represented by the same attorney as the Panicos. Such a contention can be sustained only upon a showing of conflict of interest between the defendants, and no such conflict existed here. See *Wynn* v. *United States*, 275 F. 2d 648 (C.A.D.C.); *Lott* v. *United States*, 218 F. 2d 675 (C.A. 5); *Sanders* v. *United States*, 183 F. 2d 748 (C.A. 4). Moreover, except for Salvatore Panico's initial outburst protesting his alleged lack of counsel, neither of the Panicos did anything to prejudice themselves in the eyes of the jury until after Mr. Cosentino had returned to represent the petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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NOVEMBER 1963.